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before the

Subcommittee on Courts, the Internet and Intellectual Property

of the House Committee on the Judiciary

on

"The Copyright Office's Report on Orphan Works"

March 8, 2006

Chairman Smith, Ranking Member Berman, and Members of the Subcommittee, I am pleased to appear before you on behalf of the Copyright Office to testify about our *Report on Orphan Works*, published in January of this year. In this testimony, we provide a description of the orphan works issue and the contents of the Report, as well as a discussion of some of the reactions to the Report we have received from interested parties since its publication.

By and large the reaction has been quite positive. A broad and diverse array of interests from both copyright owner and user communities including book publishers, authors, libraries, archives, museums, motion picture studios, record companies, educational institutions, documentary filmmakers and others agree with the Copyright Office's conclusion that the orphan works issue is real and needs to be addressed, and they also agree in basic concept and structure with the legislative solution proposed by the Report. Some of these groups have made constructive suggestions for changes to specific provisions of our proposal, and we are confident that issues raised by these comments can be resolved with further discussion among the interested parties.

Some individual authors and creators, however, primarily in the photography and visual image industries, are opposed to our effort to solve the orphan works problem, despite the fact that the proposal does not remove copyright for orphan works, and requires, in most cases, that the user pay the copyright owner reasonable compensation

for the use of the work. Their concerns stem mostly from the fact that legal action to enforce their copyrights is expensive, often prohibitively so. As described below and in the Report, the enforcement problems faced by these creators are real and should be addressed, but they exist whether or not orphan works legislation is passed. As a result, these concerns do not justify any delay in addressing the orphan works problem. In fact, enactment of orphan works legislation may be the catalyst necessary to prompt the non-legal, marketplace reforms that will most efficiently address the problems identified by photographers and creators of visual images.

I. Description of the Report

A. Introduction and Background

The Report addresses the important issue of "orphan works," a term used to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner. Even where the user has made a reasonably diligent effort to find the owner, if the owner is not found, the user faces uncertainty – she cannot determine whether or under what conditions the owner would permit use. Where the proposed use goes beyond an exemption or limitation to copyright, the user cannot reduce the risk of copyright liability for such use, because there is always a possibility, however remote, that a copyright owner could bring an infringement action after that use has begun.

Concerns have been raised that in such a situation, a productive and beneficial use of the work is forestalled – not because the copyright owner has asserted his exclusive rights in the work, or because the user and owner cannot agree on the terms of a license – but merely because the user cannot locate the owner. Many users of copyrighted works have indicated that the risk of liability for copyright infringement, however remote, is enough to prompt them not to make use of the work. Such an outcome is not in the public interest, particularly where the copyright owner is not locatable because he no longer exists or otherwise does not care to restrain the use of his work.

The Copyright Office has long shared these concerns, and considered the issue of orphan works to be worthy of further study. The Office was pleased that in January 2005, Chairman Smith and Mr. Berman expressed interest in the issue and supported the

request from Senators Orrin Hatch and Patrick Leahy to study the orphan works issue in detail, and to provide a report with the Office's recommendations.

After that request, in January 2005, the Office issued a Notice of Inquiry initiating this study. We received over 850 written initial and reply comments from the public, and held three days of roundtable discussions in late July in Washington, D.C. and Berkeley, California. The Office subsequently met informally with various organizations separately, in a effort to explore more specific issues raised in the comments and roundtables; they were also invited to further express their individual concerns. Our Report is the culmination of those efforts.

II. Description of Orphan Works Situations

Section III of the Report catalogs and organizes the various situations described in the comments as "orphan work" situations. The written initial and reply comments, most of which were authored by individuals, described an enormous variety of problems and proposed uses. It is difficult, however, to quantify the extent and scope of the orphan works problems from these comments, for several reasons. First, about 40% of the comments do not identify an instance in which someone could not locate a copyright owner, and another significant portion identified situations that were clearly not orphan work situations. Still, about 50% of the comments identified a situation that could fairly be categorized as an orphan works situation, and even more instances were collected in comments filed by trade associations and other groups. Thus, there is good evidence that the orphan works problem is real and warrants attention, and none of the commenters made any serious argument questioning that conclusion.

The Report describes the most common obstacles to successfully identifying and locating the copyright owner, such as (1) inadequate identifying information on a copy of the work itself; (2) inadequate information about copyright ownership because of a change of ownership or a change in the circumstances of the owner; (3) limitations of existing copyright ownership information sources; and (4) difficulties researching copyright information.[1] It then describes other situations raised by commenters that were alleged to be "orphan work" situations but upon closer inspection were outside the scope

[1] *See* UNITED STATES COPYRIGHT OFFICE, *Report on Orphan Works* 23-34 (Jan. 2006) [hereinafter "Report"]

of the inquiry. These included situations where the user contacted the owner, but did not receive permission to use the work, either because the owner did not respond to the request, refused the request, or required a license fee that the user felt was too high. Other such problems included general difficulties determining the status of copyright protection for a given work, and problems related to the legal protection accorded pre-1972 sound recordings.[2]

Finally, the Report catalogs the proposed uses that the commenters indicated were most affected by the orphan works situations. In our view these uses fall into one of four general categories: (1) uses by subsequent creators who add some degree of their own expression to existing works to create a derivative work; (2) large-scale "access" uses where users primarily wish to bring large quantities of works to the public, usually via the Internet; (3) "enthusiast" or hobbyist uses, which usually involve specialized or niche works, and also appear frequently to involve posting works on the Internet; and (4) private uses among a limited number of people.[3]

III. Legal Background

Section IV of the Report provides the legal backdrop for consideration of the orphan works issue.[4] First, it sets out the historical factors that affect the orphan works problem by describing how the issue is, in some respects, a result of the omnibus revision to the Copyright Act in 1976. Specifically, the 1976 Act made obtaining and maintaining copyright protection substantially easier than the 1909 Act. Copyrighted works are protected the moment they are fixed in a tangible medium of expression, and do not need to be registered with the Copyright Office. Also, the 1976 Act changed the basic term of copyright from a term of fixed years from publication to a term of life of the author plus 50 (now 70) years. In so doing, the requirement that a copyright owner file a renewal registration in the 28th year of the term of copyright was essentially eliminated.

These changes were important steps toward the United States' assumption of a more prominent role in the international copyright community, specifically through accession to the Berne Convention, which prohibits formalities like registration and

[2] *See* Report at 34-46.

[3] *See* Report at 36-40.

[4] *See* Report at 41-68.

renewal as a condition on the enjoyment and exercise of copyright. Moreover, there was substantial evidence presented during consideration of the 1976 Act that the formalities such as renewal and notice, when combined with drastic penalties like forfeiture of copyright, served as a "trap for the unwary" and caused the loss of many valuable copyrights. These changes, however, exacerbate the orphan works issue, in that a user generally must assume that a work he wishes to use is subject to copyright protection, and often cannot confirm whether a work has fallen into the public domain by consulting the registration records of the Copyright Office.

Section IV of the Report then goes on to describe existing provisions of copyright law that might address the orphan works situation in certain circumstances. While U.S. copyright law does not contain an omnibus provision addressing all orphan works as such, it does contain a few provisions that permit certain users to make certain uses of certain classes of orphan works, and other provisions that reduce the risk in using an orphan work. These provisions include section 108(h), section 115(b), section 504(c)(2), and the termination provisions (sections 203, 304(c), and 304(d)). These existing sections provide models that may be useful in the development of an omnibus orphan works provision.

This discussion demonstrates that the current Copyright Act does not contain provision designed to address the orphan works situation that is the subject of the Report. While some provisions, like section 108(h), might address the question for some users in certain situations, in general a user faced with an orphan works situation will not find a specific section or other provision of the Act on which he might rely to make use of the work.

Nevertheless, we believe that the focus on developing legislative text to address orphan works should not obscure the fact that the Copyright Act and the marketplace for copyrighted works provide several alternatives to a user who is frustrated by the orphan works situation. Indeed, assessing whether the situations described to use in the comments were true "orphan works" situations was difficult, in part because there is often more than meets the eye in a circumstance presented as an "orphan works" problem.

For purposes of developing a legislative solution we have defined the "orphan works" situation to be one where the use goes beyond any limitation or exemption to copyright, such as fair use. However, in practice, most cases will not be so neatly defined, and a user may have a real choice among several alternatives that allow her to go forward with her project: making noninfringing use of the work, such as by copying only elements not covered by copyright; making fair use; seeking a substitute work for which she has permission to use; or a combination of these alternatives. Indeed, evidence presented to us indicates that users in the orphan works situation make exactly these types of choices. Section IV of the Report describes some of those alternatives and how they might be applicable to different scenarios described in the comments.

Finally, Section IV of the Report sets out the international law context for consideration of an orphan works solution. Specifically, it describes the obligations that the various international copyright treaties impose on the United States with respect to imposition of formalities to copyright, limitations and exceptions to copyright and copyright remedies.

IV. Description of Proposed Solutions

Numerous comments received in the orphan works proceeding proposed solutions to the orphan works problem, and Section V of the Report catalogs and describes them. These solutions can be grouped into four categories:

- Solutions that already exist under current law and practice. These were usually noted only in passing; commenters (even commenters opposed to any orphan works provision) did not take the position that the existing law is sufficient to solve the orphan works problem.[5]
- Non-legislative solutions. An example of a solution in this category is a proposal for improved databases for locating owners of works. These solutions were also usually noted only in passing, and were not advanced as sufficient to fix the problem.[6]
- Legislative solutions that involve a limitation on remedies when a user uses an orphan work. The most substantive comments fell into this category, and most of the comments by professional organizations or academics fell into this category.[7]

[5] *See* Report at 69.

[6] *See* Report at 70.

[7] *See* Report at 71-89.

- Other legislative solutions. Examples of proposed solutions in this category are deeming all orphaned works to be in the public domain, or changing the tax or bankruptcy codes to reduce the factors that cause orphan works to come into existence in the first place. [8]

As explained in Section V, most of the comments focused on various aspects of the third category, legislative proposals involving a limitation on remedies. Almost every commenter who advocated a limitation-on-remedies system agreed that a fundamental requirement for designation of a work as orphaned is that the prospective user have conducted a search for the owner of the work, and that the search results in the owner not being located. The commenters differed in the types of searches they would consider adequate.

Many commenters were in favor of determining whether a search was reasonable on an "ad hoc" or case-by-case basis, whereby each search is evaluated according to its circumstances. This approach was offered as having the advantage of flexibility to cover the wide variety of situations that depend on the type of work and type of use involved. Several others were in favor of a "formal" approach, whereby the copyright owner is required to maintain his contact information in a centralized location, and a user need only search those centralized locations to perform a reasonable search. That approach was offered as being more certain than the "ad hoc" approach.

The commenters also discussed the role that registries would play in an orphan works system. Some proposed a mandatory registry for owner information, which was opposed by several commenters as reinstating the problematic features of the pre-1976 copyright law, and might violate international obligations related to formalities. Many commenters expressed support for voluntary registries of owner information that could be consulted by users in performing their reasonable searches. Some copyright owners expressed concern about even voluntary registries as not offering much efficiency in certain cases, such as photographs. Some commenters proposed that user registries be established in which a user would file a notice that he intends to use a work for which he cannot locate an owner. Both voluntary and mandatory user registries were proposed. Concerns were raised as to whether user registries were unnecessarily burdensome on

[8] *See* Report at 89.

owners, who might have to consult the registry frequently to monitor use of their copyrights.

Other issues discussed by the commenters and described in Section V include whether the orphan works system should be limited based on the age of the work, on whether the work is unpublished, and on whether the work is of foreign origin. Many commenters expressed the view that none of these characteristics should disqualify any particular work; rather, these aspects of a work should be considered in the determination of whether the search for the owner was reasonable. Some commenters also proposed that the use of orphan works be limited to non-profit educational or cultural institutions.

Once a work has been designated as an orphan work, several comments addressed whether the user would have to pay any fees for the use of the work. A common suggestion was that the user be obligated to pay a reasonable license fee if the copyright owner surfaced after use began. Others proposed a low fixed statutory fee, such as $100 per work used, and another suggestion was the actual damages caused by the use be limited by a low statutory cap. Some participants favored the use of an escrow that users would pay into upon use of the orphan work, with that money distributed to owners if they surfaced.

If an owner does appear and claim infringement, most commenters agreed that some limitation on the remedies for infringement is essential to enabling the use of the work. Most agreed that statutory damages and attorneys fees should not be available, because those remedies create the most uncertainty in the minds of users. With respect to injunctive relief, many commenters proposed that the orphan work user be permitted to continue the use he had been making before the owner surfaced, but that new uses of the work remain subject to injunction and full copyright remedies.

V. Conclusions and Recommendations

Section VI of the Report contains the Copyright Office's conclusions and recommendations.[9] Our conclusions are:

- The orphan works problem is real.
- The orphan works problem is elusive to quantify and describe comprehensively.

[9] *See* Report at 92.

- Some orphan works situations may be addressed by existing copyright law, but many are not.
- Legislation is necessary to provide a meaningful solution to the orphan works problem as we know it today.

The Report recommends that the orphan works issue be addressed by an amendment to the Copyright Act's remedies section. The specific language we recommend is provided at the end of the Report.[10]

In considering the orphan works issue and potential solutions, the Office has kept in mind three overarching and related goals. First, any system to deal with orphan works should seek primarily to make it more likely that a user can find the relevant owner in the first instance, and negotiate a voluntary agreement over permission and payment, if appropriate, for the intended use of the work. Second, where the user cannot identify and locate the copyright owner after a reasonably diligent search, then the system should permit that specific user to make use of the work, subject to provisions that would resolve issues that might arise if the owner surfaces after the use has commenced. In the roundtable discussions, there seemed to be a clear consensus that these two goals were appropriate objectives in addressing the orphan works issues. Finally, efficiency is another overarching consideration we have attempted to reflect, in that we believe our proposed orphan works solution is the least burdensome on all the relevant stakeholders, such as copyright owners, users and the federal government.

The proposed amendment follows the core concept that many commenters favored as a solution to the orphan works problem: if the user has performed a reasonably diligent search for the copyright owner but is unable to locate that owner, then that user should enjoy the benefit of limitations on the remedies that a copyright owner could obtain against him if the owner showed up at a later date and sued for infringement. The recommendation has two main components:

- the threshold requirements of a reasonably diligent search for the copyright owner and attribution to the author and copyright owner; and
- the limitation of remedies that would be available if the user proves that he conducted a reasonably diligent search.

[10] *See* Report at 127.

The details of the recommendation are set out in Section VI, followed by a discussion of some other proposals that we considered carefully, but ultimately decided not to recommend.[11]

A. The Reasonably Diligent Search Requirement

Subsection (a) sets out the basic qualification the user of the orphan work must meet – he must perform a "reasonably diligent search" and have been unable to locate the owner of the copyright in the work. Such a search must be completed before the use of the work that constitutes infringement begins. The user has the burden of proving the search that was performed and that it was reasonable, and each user must perform a search, although it may be reasonable under the circumstances for one user to rely in part on the search efforts of another user.

Several commenters complained of the situation where a user identifies and locates the owner and tries to contact the owner for permission, but receives no response from the owner. They suggested that works in these situations should be considered orphan works. We have concluded that such a solution is not warranted, as it touches upon some fundamental principles of copyright, namely, the right of an author or owner to say no to a particular permission request, including the right to ignore permission requests. For this reason, once an owner is located, the orphan works provision becomes inapplicable.

The proposal adopts a very general standard for reasonably diligent search that will have to be applied on a case-by-case basis, accounting for all of the circumstances of the particular use. Such a standard is needed because of the wide variety of works and uses identified as being potentially subject to the orphan works issues, from an untitled photograph to an old magazine advertisement to an out-of-print novel to an antique postcard to an obsolete computer program. It was not possible for our Report to craft a standard that could be specific to all or even many of these circumstances. Moreover, the resources, techniques and technologies used to investigate the status of a work also differ among industry sectors and change over time, making it hard to specify the steps a user must take with any particularity.

[11] *See* Report at 93-122.

Section VI contains a discussion of several factors that commenters identified as being relevant to the reasonableness of a search, including:

- The amount of identifying information on the copy of the work itself, such as an author's name, copyright notice, or title**;**
- Whether the work had been made available to the public**;**
- The age of the work, or the dates on which it was created and made available to the public**;**
- Whether information about the work can be found in publicly available records, such as the Copyright Office records or other resources;
- Whether the author is still alive, or the corporate copyright owner still exists, and whether a record of any transfer of the copyright exists and is available to the user**;** and
- The nature and extent of the use, such as whether the use is commercial or noncommercial, and how prominently the work figures into the activity of the user.

Importantly, our recommendation does not exclude any particular type of work from its scope, such as unpublished works or foreign works. Section VI explains why we believe that unpublished works should not be excluded from this recommendation, and how the unpublished nature of a work might figure into a reasonable search determination.

Our recommendation permits, and we encourage, interested parties to develop guidelines for searches in different industry sectors and for different types of works. Most commentators were supportive of voluntary development of such guidelines. When asked whether the Copyright Office should have authority to embody guidelines in more formal, binding regulations to provide certainty, we were surprised to hear that most user groups – whom we thought would desire more certain rules for searches – opposed the Copyright Office issuing rules related to search criteria. Based on our desire to maintain flexibility in the reasonable search standard and this expressed opposition to formal rulemaking, we have not proposed that the orphan works legislation provide the Office with any rulemaking authority.

B. The Attribution Requirement

We also recommend one other threshold requirement for a user to qualify for the orphan works limitations on remedies: throughout the use of the work, the user must provide attribution to the author and copyright owner of the work if such attribution is

possible and as is reasonably appropriate under the circumstances. The idea is that the user, in the course of using a work for which he has not received explicit permission, should make it clear to the public that the work is the product of another author, and that the copyright in the work is owned by another. While only a handful of commenters proposed a requirement along these lines, we found several good reasons to support this requirement, described in Section VI, including the notion that attribution is critically important to authors, even those who consent to free use of their works. The requirement of attribution should be a flexible rule, and should not be interpreted in a strict way to create unnecessarily another obstacle to the use of orphan works.

C. Other Alternatives Considered

There were two other mechanisms proposed to help address the orphan works issue that we considered but ultimately concluded would not be appropriate to recommend at this time. First, as noted above, some commenters suggested that users should be required to file with the Copyright Office some public notice that they have conducted a reasonable search and intend to use an orphan work. While a centralized registry of user certifications or notice of intent to use sounds promising on the surface, upon closer examination there are potential pitfalls that outweigh the benefits at this time, for reasons that we describe in Section VI.

The other mechanism proposed by some commenters is a requirement that orphan works users pay into an escrow before commencing use. In our view, an escrow requirement in an "ad hoc" reasonable search system like we recommend would be highly inefficient. Every user would be required to make payment, but in the vast majority of cases, no copyright owner would resurface to claim the funds, which means the system would not in most cases actually facilitate payments between owners and users of orphan works. We are sympathetic to the concerns of individual authors about the high cost of litigation and how, in many cases, the individual creator may have little practical recourse in obtaining relief through the court system. We believe that consideration of new procedures to address this situation, such as establishment of a "small claims" or other inexpensive dispute resolution procedure, would be an important issue for further study by Congress.

D. Limitation on Remedies

If a user meets his burden of demonstrating that he performed a reasonably diligent search and provided reasonable attribution to the author and copyright owner, then the recommended amendment would limit the remedies available in that infringement action in two primary ways: First, it would limit monetary relief to only reasonable compensation for the use, with an elimination of any monetary relief where the use was noncommercial and the user ceases the infringement expeditiously upon notice. Second, the proposal would limit the ability of the copyright owner to obtain full injunctive relief in cases where the user has transformed the orphan work into a derivative work like a motion picture or book, preserving the user's ability to continue to exploit that derivative work. In all other cases, the court would be instructed to minimize the harm to the user that an injunction might impose, to protect the user's interests in relying on the orphan works provision in making use of the work.

1. Monetary Relief

A vast majority of the commenters in our study agreed that the prospect of a large monetary award from an infringement claim, such as an award of statutory damages and attorneys' fees, was a substantial deterrent to users who wanted to make use of an orphan work, even where the likelihood of a claim being brought was extremely low. Most of the proposals for addressing the orphan works problem called for clear limitations on the statutory damages and attorneys' fees remedies in cases involving orphan works. Our recommendation follows this suggestion by limiting the possible monetary relief in these cases to only "reasonable compensation," which is intended to represent the amount the user would have paid to the owner had they engaged in negotiations before the infringing use commenced. In most cases it would equal a reasonable license fee, as that concept is discussed in recent copyright case law.

While many commenters supported a general remedy like "reasonable compensation," some expressed concern about the impact that *any* monetary remedy at all might have on their ability to go forward and use orphan works. For example, museum representatives explained that they would like to use hundreds or even thousands of orphan works in their collections, so the potential of even a minimal monetary award

for each work, would, in their view, be prohibitive. Libraries and archives made similar observations, noting their desire to make large collections of orphan works accessible.

In our view, a general standard of reasonable compensation is the right solution to this problem, for several reasons. First, with respect to the concern about a chilling effect of any monetary remedy, it must be noted that in nearly all cases where a diligent search has been performed, the likelihood of a copyright owner resurfacing should be very low, so that no claim for compensation is ever made. Second, it should be clear that "reasonable compensation" may, in appropriate circumstances, be found to be zero, or a royalty-free license, if the comparable transactions in the marketplace support such a finding. Our discussions with museums, universities and libraries indicated that in many orphan works situations a low or zero royalty is likely to be the reasonable compensation.

In addition, to make absolutely sure that the concerns of nonprofit institutions like libraries, museums and universities about monetary relief are assuaged, we recommend an additional limitation on monetary relief where the user is making a non-commercial use of the work and expeditiously ceases the infringement after receiving notice of the infringement claim. In that case, there should be no monetary relief at all. Libraries, archives and museums indicated that posting material on the Internet was a primary use they would like to make of orphan works, and that they would take down any material if a copyright owner resurfaced. This additional provision provides certainty about their exposure in that circumstance. If the organization wishes to continue making use of the work, it would have to pay reasonable compensation for its past use, and, as described below, for future use of the work.

2. Injunctive Relief

In addition to the limits on monetary relief, several commenters in this proceeding suggested that limitations on injunctive relief were needed as well. Most specifically, users who would like to create derivative works based on orphan works, most notably filmmakers and book publishers, stressed that the fear of an untimely injunction – brought just as the book was heading to stores, or just before release of the film – provides enough uncertainty that many choose not use the work, even though the likelihood of such injunction is small.

In light of these comments, we recommend that injunctive relief for infringement of an orphan work be limited in two ways. First, where the orphan work has been incorporated into a derivative work that also includes significant expression of the user, then injunctive relief will not be available to stop the use of the derivative work, provided the user pays reasonable compensation to the copyright owner. Second, in all other cases, full injunctive relief is available, but the court must account for and accommodate any reliance interest of the user that might be harmed by an injunction. For example a full injunction will still be available where a user simply republishes an orphan work, or posts it on the Internet without transformation of the content.

E. Administrative Provisions

We also recommend two other administrative provisions. First, a savings clause that makes clear that nothing in the new section on orphan works affects rights and limitations to copyright elsewhere in the Copyright Act, which is consistent with the structural approach of placing the provision in the remedies chapter. Second, we recommend that the provision sunset after ten years, which will allow Congress to examine whether and how the orphan works provision is working in practice, and whether any changes are needed.

F. International Context

The Notice of Inquiry asked questions about how any proposed solution to the orphan works issue would comport with the United States' international obligations in the various copyright treaties. Our recommendation does not exclude foreign works from its scope, so it must comport with the United States' international copyright obligations. We believe that one of the primary advantages of the ad hoc, reasonably diligent search approach is that it is fully compliant with international obligations.

G. Application to Types of Uses

To further explain how our recommendation would work in practice, Section VI takes the four general categories of users described in Section III and describes how the recommended limitation on remedies would apply in each scenario.[12] The Section describes how the Subsequent Creator, Large-Scale Access User, Enthusiast User and Personal User would proceed under the recommendation. We believe that nearly all

[12] *See* Report at 122-126.

orphan work situations are encompassed by one of those four categories, so that if our recommendation resolves these users' concerns in a satisfactory way, it will likely be a comprehensive solution to the orphan works situation.

VI. Reactions to the Report

The reactions we have heard to our Report, for the most part, have been overwhelmingly positive. A broad array of copyright owners and copyright users: book publishers, libraries, archives, museums, educational institutions, record companies, motion picture studios, independent filmmakers, software publishers and others, have praised the Report and support the basic concept and structure of the proposed legislation. Several of these groups have pointed out specific features of our recommendation that might create unintended consequences, or suggested modifications to the language to address specific concerns.

In this section of the testimony, we comment on some of these reactions and suggestions. As noted in the Report, we proposed specific legislative language to help clarify our conclusions and recommendations by giving interested parties a more concrete understanding of what our conclusions entail. We also recognized that interested parties might have suggested revisions that would improve the clarity of the text or avoid unintended consequences of the language that we proposed.[13] In other words, we recognize that our proposal is likely a starting point for legislation to address orphan works, and would be pleased to work with the Committee, its staff and interested parties on modifying that language. In general, however, these groups are supportive of the overall approach, and the proposed changes are issues that very likely can be resolved with further discussion, and which will result in compromise draft legislation supported by the vast majority of copyright owner and user interests.

A. The Problem of Photographs and Other Visual Images

The one exception to the broad support for our proposed legislation involves certain groups representing individual copyright owners of visual works, such as photographers, illustrators, and graphic artists. They oppose our proposal, which was not unexpected, as many of them filed comments in our proceeding recommending that no change be made to the law to address the orphan works problem. They argue that many,

[13] *See* Report at 93.

if not most, of their works will be inaccurately labeled orphan works, because it is difficult and often impossible to find the copyright owner of a visual image, usually because the name of the creator is not on the copies of the works distributed to the public. Moreover, existing sources of ownership information are text-based and often not useful if the user only has the work, and not any other information about the work, before him.

In other words, these groups concede the very problem that is at the heart of the Report – a user seeking to locate a photographer or illustrator of an image that has no identifying information on the work itself faces a daunting challenge. The Copyright Office registration records are text-based, and in most cases registration records do not contain much, if any, description of the subject matter of the image. Indeed, efforts by the Office to accommodate photographers by making it easier to register photographs (*e.g.*, the recent regulations permitting group registration of published photographs), while responding to complaints from photographers about the difficulties they have had in registering their works, have probably made the registration system less useful for determining copyright ownership of particular photographs. So even if a photographer has registered his works with the Copyright Office, it may be the case that a user will not be able locate that owner.

Our proposal anticipates and provides safeguards for this situation in a number of ways, primarily by preserving meaningful remedies for owners of works that might be subject to the orphan works legislation. First, in most cases, including all commercial uses, the user of an orphan work is obligated to pay the copyright owner "reasonable compensation" for the use prior to the time the owner resurfaces. Also, the user will not generally not be able to continue making the use after the owner asserts his copyright, unless the user meets the requirements of Section 514(b)(2)(A), and even in that case will be required to pay reasonable compensation to the owner going forward. And in order for noncommercial users to avoid the requirement of reasonable compensation, they must cease the infringement expeditiously after the owner assert his rights, thus preserving future exploitation to the owner's exclusive rights.

Despite being entitled to "reasonable compensation" and these remedies in most orphan work cases, photographers oppose the proposal because they claim that bringing a lawsuit to collect this compensation will be prohibitively expensive. We agree that *legal*

actions to enforce copyrights in visual images are expensive for individual creators, just as any access to our court system is costly. However, this problem exists for copyrighted visual images regardless of whether orphan works legislation is passed or not. Moreover, there are *non-legal* actions that the photographers, illustrators and similar creators can take to enforce and exploit their copyrights, and at the same time, help eliminate the possibility that their works would fall into the orphan works system.

As a practical matter, a marketplace of licenses and permissions for use of photographs simply cannot exist where potential buyers cannot find the sellers of rights in visual images. Creators of visual images need to address the problem first and foremost, and primarily through non-legal actions – through more consistent marking of copies of their works, through development of mechanisms like collective licensing organizations that can provide ownership and licensing information to users, and by deploying technology to allow searches for owners where the user only has the image and no contextual information. Steps like these will help individual owners enforce and receive payment for their copyrighted images, and, at the same time, ensure that they are locatable and that their works do not become orphan works. It is important that any legislative solution to address orphan works include photographs and other visual images within its scope to resolve the numerous orphan works problems that exist with these types of works. Moreover, failing to include such works in the scope of the legislation would likely allow visual image copyright owners to avoid resolving these more fundamental problems with non-legal, marketplace reforms.

As to the legal actions that individual creators can take to enforce their rights, our Report acknowledges the real obstacle faced by photographers and other individual copyright owners from the expense of infringement lawsuits. We agree that a more efficient dispute resolution procedure, such as a "small claims" procedure for copyright infringement claims involving relatively small damage amounts, would offer individual owners better access to legal protection of their rights. Such a procedure would also allow these owners to obtain the "reasonable compensation" they would be due under our orphan works proposal even if their works fall into the orphan category. We would be pleased to work with the Subcommittee and interested parties in exploring possible new procedures. It should be noted, however, that the key to creating a more efficient

marketplace for copyrighted visual images is not increased litigation, but making it easier for owners and users to find each other, which our orphan works proposal encourages.

In sum, we understand the concerns of photographers and other visual image creators. They face difficulties exploiting their copyright, particularly in light of new technology like the Internet, and solutions to those problems, both legal and non-legal, should be explored and developed. That fact, however, does not deny that there is a very real problem of orphan works that needs to be addressed, and those issues should not delay Congress in its consideration and enactment of orphan works legislation.

B. Other Comments and Suggestions

The other comments and suggestions we have received concern specific provisions in the Report's proposed language. First, some groups remain concerned that a general standard of "reasonable compensation" might result in high damage awards that would discourage use of orphan works. For reasons set out in the Report, we think this concern is unfounded, particularly in light of the exception that limits monetary relief to no compensation where the use is noncommercial and the user ceases the infringement when the owner resurfaces.

One suggestion made to address this issue is for the statute to define "reasonable compensation" with language from the Report that specifies that it "would equal what a reasonable willing buyer and reasonable willing seller in the positions of the owner and user would have agreed to at the time the use commenced, based predominantly by reference to evidence of comparable marketplace transactions."[14] We agree that including language like this in the legislation would be a helpful clarification. We also believe that legislative history providing examples of how reasonable compensation would be determined in different circumstances would also be helpful.

On the related question of whether the orphan work user's activity is done "without direct or indirect commercial advantage," which would make that user potentially eligible for no monetary relief, our Report attempts to recognize that some non-profit organizations engage in different types of activity, some of which is commercial and some non-commercial. Museums and other nonprofit organizations have asserted that their activities involving the sale of books or other items using copyrighted

[14] *See* Report at 116.

materials are simply a matter of "cost recovery" and should not be considered commercial for the purposes of our proposal. We cannot accept that proposition categorically, especially where the institution has paid other located copyright owners for the use of their works in the same book or product that contains the orphan work. Nevertheless, we agree the drawing lines between situations is difficult, and look forward to working with museums and others on illustrative examples that can be used in the legislative history to help draw those lines.

Second, some groups have expressed concern with our requirement that the orphan work user attribute the author and copyright owner during their use of the work. Specifically, museums and others have said that determining the copyright owner, as opposed to the author, is often difficult and confusing, and therefore it should not be required. In our view, however, as the Report explains, attributing the copyright owner, if possible, is an important piece of information that other users and the public should be able to learn from the orphan work user. It also will increase the likelihood that the owner will surface after use begins and voluntary agreement over the use can be reached. If the user is unsure of who owns the copyright, then it may not be possible for him to attribute the copyright owner. Also, the manner of attribution should be determined as is reasonable under the circumstances. These two considerations, embodied in our proposal, account for the concerns expressed about attributing the copyright owner, and thus it should remain a requirement.

Third, with respect to injunctive relief provision of proposed Section 514(b)(2)(A), some have expressed concern about what types of works would be included in that provision. Specifically, some are concerned that the use of the term "derivative work" might not be broad enough to encompass works that our Report explains should be included – the historical book which includes photographs or the inclusion of a sculpture in a scene of a motion picture – because these works do not necessarily "transform" or alter the underlying orphan work. As we note in the Report, the concept behind this provision – with which we have not heard disagreement – was to capture the situation where the user creates a new work that relies to a significant extent on the underlying orphan work, as contrasted with the situation where the user merely republishes the orphan work, either alone or as part of a compilation. We agree that the

language in this section could be more clear, and would be pleased to work with interested parties on ways it could be amended to better reflect the concept that underlies it.

Fourth, several groups have expressed concerned about the sunset provision, and have questioned how it applies where a use begins before the 10-year period is over but continues afterward. It was our intent to allow any user who begins use in reliance on the proposed Section 514 before the 10-year period is over to be able to benefit from the provision, even after the 10-year period ends. Changing the word "occurring" to "commencing" would help make that clear, and we would be pleased to discuss further changes to clarify this point. As to whether a sunset provision is appropriate, it is likely that at least some minor — and perhaps some major — adjustments to the orphan works legislation will be advisable after we have had a few years' worth of experience with it.[15] We certainly do not believe that the provisions of the orphan works legislation should actually expire. But without a sunset provision, it may be difficult to persuade a future Congress to modify the existing legislation if it is deemed to be "good enough." Requiring reauthorization after a reasonable number of years will ensure that Congress will, as a practical matter, have little choice but to ask itself at that point whether and how the existing regime can be improved.

As noted above, we would be pleased to work with the Committee, its staff and the interested parties on these or any other issues related to our proposal. We have been greatly encouraged by the generally positive reaction so far, and hope that balanced, comprehensive and effective legislation to address this important issue can be introduced and enacted in the near future.

[15] To that end, we would also welcome a study at some point before the end of the 10-year period to assess how the orphan works legislation is working, even if no sunset provision is enacted.